

OPINION
45-57

August 20, 1945 (OPINION)

CLERK OF DISTRICT COURT

RE: Fees in Discharge in Bankruptcy

Your letter dated August 13, 1945, addressed to John Graham, State Examiner, has been referred by him to this office for reply.

In your letter to Mr. Graham you say: "There's a couple of judgments docketed in Pembina County on transcript from other counties. The judgment debtor now lives in Pembina County and through his attorney has filed with me a certified copy of a discharge obtained through the bankruptcy laws of the United States under section 28-2030 of North Dakota's Revised Codes. Plans starting proceedings in Pembina County to have court order the two judgments discharged."

As clerk of the district court you desire to be informed as to what fee should be charged for filing a certified copy of a certificate of discharge in bankruptcy and any other proceedings in connection therewith.

The fees to be charged by the clerk of court are prescribed in section 11-1704 of the Revised Code of 1943. However, the schedule of fees prescribed under twenty-two subsections of this section apparently does not definitely include the fee which should be charged for filing a certified copy of the proceeding instituted in district court for the discharge of a judgment. And in view of this situation your conclusion is probably just as sound as mine.

In the case of an ordinary judgment in a civil action, the proper procedure would be to secure a discharge thereof in the county where it was obtained. Then it would be the duty of the clerk of court of such county to notify the clerk of court of any other county to which such judgment has been transcribed. However, as noted in your letter, section 28-2030 provides an exception to this procedure.

It is not clear whether the proceeding mentioned in your letter should be classed as an action or a special proceeding. Section 32-0102 of the revised code defines action as follows:

"An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense."

The term "special proceeding" is defined by section 32-0104 as "any remedy other than an action."

An action is defined in Black's Dictionary as "merely the judicial means of enforcing a right." Bovier defines an action to be a formal demand of one's right from another person or party, made and insisted on in a court of justice. The term "action" is defined in Words and Phrases as "the legal demand of one's rights in a court of justice,

and in this sense it may be said to include any proceedings in such a court for the purpose of obtaining redress as the law provides."

It will be noted that under the provisions of section 28-2030, an applicant for an order from the district court directing the clerk of court to satisfy a judgment must give notice of hearing of such application to the judgment creditor, which implies that the judgment creditor may appear and object to the application. In other words, this procedure is quite analogous to an application in district court for an order to show cause.

While it may be argued that the proceedings prescribed in section 28-2030 is of the nature of a special proceeding in that it is ancillary or in aid of a judgment in bankruptcy in federal court, in my judgment the proceeding outlined in said section is an action, and that therefore you have properly charged a filing fee of \$5.00.

NELS G. JOHNSON

Attorney General